Supreme Court, U.S.
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No. 94-1423

In The

Supreme Court of the United States

October Term, 1994

JOHN E. PELOZA,

Petitioner,

v.

CAPISTRANO UNIFIED SCHOOL DISTRICT, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The Ninth Circuit Court Of Appeal

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Based upon the Complaint, documents provided by defendants which were incorporated therein by reference, and judicially noticed public records dealing with issues raised in the Complaint, the District Court dismissed Plaintiff John Peloza's federal civil rights and conspiracy lawsuit. The United States Court of Appeals for the Ninth Circuit affirmed that decision.

1. Does a public school district have the right and/or duty to preclude a teacher from religious proselytization of students when students are in attendance pursuant to compulsory education laws and the teacher is on paid contract time?

2. Is the Ninth Circuit's analysis in this case dealing with teacher speech and the Establishment Clause in conflict with the decisions of other circuits?

3. Did the Ninth Circuit err when, as part of its consideration of a motion for dismissal brought under Federal Rule of Civil Procedure 12(b)(6), it reviewed documents that were judicially noticed, and documents that were incorporated into the pleadings by reference?

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RELIEF REQUESTED

Defendants respectfully request that this Court deny Peloza's Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

OPINIONS

The United States Court of Appeals for the Ninth Circuit issued its decision on October 4, 1994. The decision is reported as *Peloza v. Capistrano Unified School Dist.*, 37 F.3d 517 (9th Cir. 1994). The decision affirmed the judgment of the United States District Court for the Central District of California filed on February 27, 1992, which is reported as *Peloza v. Capistrano Unified School Dist.*, 782 F.Supp. 1412 (C.D. Cal. 1992).

JURISDICTION

Peloza's Complaint alleged a civil action for deprivation of rights under 42 U.S.C.A. sections 1981, 1983 and 1985 (West 1994). The District Court therefore had jurisdiction pursuant to 28 U.S.C.A. section 1331 (West 1993). This Court has jurisdiction pursuant to 28 U.S.C.A. Section 1254(a) (West 1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

In pertinent part, Title 42 U.S.C.A. section 1983 (West 1994) states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Relevant state statutes and regulations are set forth in Appendix A.

STATEMENT OF THE CASE

Plaintiff John Peloza is a biology teacher at a public high school. Parents, teachers and students began expressing concerns that during paid contract time Peloza was advocating his religious beliefs to students in an attempt

to proselytize them. Concerns were also raised over Peloza's apparent refusal to follow the established curriculum when teaching the subject of evolution. The Capistrano Unified School District ("District"), pursuant to its duty to avoid an Establishment Clause violation, directed Peloza to stop.

On September 3, 1991, Peloza filed his Complaint for Damages and for Injunctive and Declaratory Relief against Defendants the District, the Board of Trustees of the District, the principal and assistant principal of Capistrano Valley High School, several teachers at the high school, and an attorney employed by the Orange County Department of Education.

The primary thrust of the Complaint, as set forth in the first paragraph, concerned Peloza's desire, based on his religious principles, to avoid teaching the established biology curriculum relating to evolution. (Appendix to Petition 58a-60a). The Complaint incorporated by reference a written directive to Peloza, which dealt not only with teaching of the established curriculum but his proselytizing of students both within and outside his classroom. (Appendix to Petition 64a, para. 26.) Copies of that written directive and an earlier directive also incorporated into the Complaint by reference were supplied to the District Court as part of the Defendants' motion for dismissal under Federal Rule of Civil Procedure 12(b)(6). (The Declaration of Thomas Anthony, with the two exhibits setting forth the entire text of the directives, incorporated by reference into the Complaint in paragraph 26, is attached hereto as Appendix B.)

In addition to directing Peloza to comply with the State's Science Framework in teaching evolution,[1] the written reprimand set forth complaints from parents with respect to Peloza's proselytizing of students both during and outside of class, and contained specific directives with respect to his expected future conduct. (Appendix B at 4b-14b.) The parents complained about conversations with students during class, at lunch time, and after class. During these conversations, Peloza preached from the Bible and stated his convictions that those who did not believe in Jesus would go to hell, and would be subject to constant "burning, your teeth are getting knocked out, you are always suffering, there are demons around you for all eternity, and you can never leave." (Appendix B at 9b.) He went so far as to inform one Jewish student that because she was thinking of converting, she in fact was converted; he prayed with her and then told her that she was irrevocably converted. (Appendix B at 9b-10b.)

These types of complaints prompted the District to give Peloza the following directive on February 7, 1991:

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[1] At Defendants' request, the District Court also took judicial notice of the California Department of Education's Science Framework which Peloza was required to follow. (See Appendix to Petition at 4a.) As noted by the incorporated directive, Peloza was specifically directed to teach the theory of evolution as required by the State Framework. (See Appendix B at 13b-14b.) Although the major thrust of Peloza's arguments at both the trial and appellate court levels was his contention that he should not be required to teach evolution as part of the standard biology curriculum, Peloza has apparently decided not to pursue that issue as part of this Petition, since the issues raised in that respect were in fact decided by this Court in *Edwards v. Aguillar*, 482 U.S. 578 (1987).

> You are hereby directed to refrain from any discussion of religion in any of your science classes, and to refrain from attempting to influence your students to accept your own personal religious or philosophical beliefs. You are directed to follow the course outlines in the subject area of high school biology and, more specifically, in the teaching of evolution.
>
> You are further directed to refrain from making any comments about Jesus Christ, about the fact that people who do not believe in Jesus Christ burn in hell, and to refrain from discussing religion or quoting from the Bible during any of your classes. If a student does ask you a question about religion, you are directed to refer them to their parents or to their own clergy person for guidance. (Appendix B at 13b-14b.)

Peloza's constant inquiries and assertions that during the school day he was free to conduct himself as he desired outside of the classroom (Appendix to Petition at 65a-66a, para. 32), led the District to expand its original directive. On May 13, 1991, the District issued a second expanded directive. The May 13, 1991, directive is set forth in paragraph 43 of the Complaint, as follows:

> You are hereby directed to refrain from any attempt to convert students to Christianity or initiating conversations about your religious beliefs during instructional time, which the District believes includes any time students are required to be on campus as well as the time students immediately arrive for the purposes of attending school for instruction, lunch time, and the time immediately prior to students' departure after the instructional day. Please be advised that should you fail to comply with

> these written directives, or should there be any additional incidents of this kind, further disciplinary action will be considered. (Appendix to Petition at 68a, para. 43.)

As noted in the Ninth Circuit opinion:

> Peloza seeks a declaration that this definition of instructional time is too broad, and that he should be allowed to participate in student-initiated discussions of religious matters when he is not actually teaching class. (Appendix to Petition at 46a-47a; see also paragraph 3 of the Complaint (Appendix to Petition at 60a) wherein Peloza asserts that the definition of instructional time is too broad.)[2]

The District consistently has taken the position that while acting in a paid status as a public school teacher, Peloza was not free to use his District paid time and position to preach his religious beliefs to students who were present pursuant to compulsory attendance laws.

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[2] Throughout the record of these proceedings there are alternate references to "instructional time" and "contract time," which, in effect, have essentially the same meaning when students are present. (See Petition at page 4 for definition of contract time as "anytime while working as a teacher." See also, Appendix to Petition at 47a.) In all respects Plaintiff is on paid time and functioning as a teacher. In his Opening Brief to the Ninth Circuit, Plaintiff stated:

> Contract time is the time when a teacher is required to be on the school premises but is not involved in classroom instruction. . . . Again, Peloza sought a declaration of his rights to have private, student-initiated discussions on religious topics during his contract time and not during classroom time. (Appellant's Opening Brief to the Ninth Circuit at pp. 47-48.)

The District's position mirrors the California Education Code and state regulations which include within the instructional day times when students are required by compulsory attendance laws to be present at school. Cal. Code Regs. tit. 5, §§ 5552, 5570 (1995); Cal. Educ. Code, § 44807 (West 1993). See also *Johnson v. Huntington Beach Union High School Dist.*, 68 Cal. App. 3d 1, 14, n. 12, 137 Cal. Rptr. 43, 50, *cert. denied*, 434 U.S. 877 (1977). Cf. *Katz v. McAulay*, 438 F.2d 1058, 1061 (2d Cir. 1971), *cert. denied*, 405 U.S. 933 (1972).

In considering this issue, the District Court noted among other things that the District has a strong interest in maintaining its secular purpose of educating students and protecting students' right to freedom from religious influence and indoctrination in public school classrooms. (Appendix to Petition at 13a.) The court concluded that the District correctly instructed Peloza to refer religious issues raised by students to their parents or clergy. The court noted:

> This instruction is not a violation of the plaintiff's first amendment right to free speech, but rather a directive to insure that religious dogma is not taught in the public school. (Appendix to Petition at 14a.)

In upholding the decision, the Ninth Circuit, after reviewing this Court's decisions in *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506-07 (1969) ("*Tinker*"), and *Lamb's Chapel v. Center Moriches Union Free School Dist.*, ___ U.S. ___, 113 S.Ct. 2141, 2148 (1993), concluded that the District's directive was consistent with its constitutional responsibility to avoid violation of the Establishment Clause. The court majority stated:

> While at the high school, whether he is in the classroom or outside of it during contract time, Peloza is not just any ordinary citizen. He is a teacher. He is one of those especially respected persons chosen to teach in the high school's classroom. He is clothed with the mantle of one who imparts knowledge and wisdom. His expressions of opinion are all the more believable because he is a teacher. The likelihood of high school students equating his views with those of the school is substantial. To permit him to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause of the First Amendment. Such speech would not have a secular purpose, would have the primary effect of advancing religion, and would entangle the school with religion. (Appendix to Petition at 47a-48a.)

Peloza sought a rehearing, with a suggestion of rehearing en banc, with the United States Court of Appeals for the Ninth Circuit, which was denied on November 25, 1994. (Appendix to Petition at 57a.) This Petition for Writ of Certiorari followed.

SUMMARY OF ARGUMENT

The District issued specific directives to Peloza precluding him from proselytizing students both in and out of the classroom when acting as a paid teacher. Both the trial and appellate courts reviewed those directives as part of their respective proceedings.

In issuing those directives, the District acted well within its rights and responsibilities as recognized by

decisions from this Court. In light of the well-established state of the law and a lack of any real conflict between any of the circuits, no basis justifies granting the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I

THE DISTRICT HAD BOTH THE RIGHT AND THE RESPONSIBILITY TO INSURE THAT PUBLIC SCHOOL TEACHERS DO NOT USE THEIR POSITIONS FOR FURTHERING THEIR OWN PERSONAL RELIGIOUS INTERESTS.

In *Hazelwood School Dist. v. Kuhlmeir,* 484 U.S. 260 (1988) (*"Hazelwood"*), this Court recognized that public schools do not necessarily qualify as public fora and that school officials may impose reasonable restrictions on the speech of students, teachers and other members of the school community. 484 U.S. at 267. The Court distinguished *Tinker* on the basis that there is a substantial difference between tolerating and promoting individual speech. 484 U.S. at 270-271. With respect to a school district's right to be free from promoting particular speech, the Court recognized that a school had authority over such school-sponsored matters as publications, theatrical productions, and "other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Id.* The Court went on to note that these types of activities "may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom

setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." 484 U.S. at 271.[3]

The Court concluded that district officials were entitled to exercise greater control over this type of expression in order to "assure . . . that the views of the individual speaker are not necessarily attributed to the school." *Id.* In *Hazelwood,* this Court found no offense to the First Amendment when control was asserted over speech in school-sponsored expressive activity so long as the control was reasonably related to legitimate pedagogical concerns. 484 U.S. at 272.

A key character in the school-sponsored educational process is the paid school teacher. Not only is the teacher involved in the presentation of information or curriculum but he/she is also a disciplinarian, holding students responsible for their conduct at all times while on the school campus. Cal. Educ. Code § 44807 (West 1993). *See also* Cal. Code Regs. tit. 5, § 5552 (West 1995). State law requires that the teacher be present at least 30 minutes before the instructional day begins. Cal. Code Regs. tit. 5, § 5570 (West 1995). The teacher also serves as a role model. "[W]hether consciously or otherwise," the teacher "demonstrates the appropriate form of civil discourse and public political expression by his conduct and deportment in and out of class." *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 683 (1986). *See also*

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[3] In *Tinker,* the Court also recognized that the cafeteria, playing field, or other on-campus areas where students are present during authorized hours are important to the educational process. 393 U.S. at p. 512.

Edwards v. Aguillar, 482 U.S. 578, 583 (1987); and *Board of Educ. of the Westside Community Schools v. Mergens*, 496 U.S. 226, 251 (1990). Because teachers serve a unique role as disciplinarians and role models, a school district has the right to hold them accountable for their conduct, including speech, to insure that it furthers the interest and purpose for which they are hired. *See Pickering v. Board of Educ.*, 391 U.S. 563 (1968) ("*Pickering*"). Teaching religion is clearly not a part of that purpose and, in fact, is contrary to the Establishment Clause protections guaranteed to students and their parents. As noted by this Court in *Edwards v. Aguillar*:

> Families entrust public schools with the education of their children, but condition that trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable, and their attendance is involuntary.

482 U.S. at 583-84.

This Court has further declared that, "[t]he state must be certain, given the religion clauses, that subsidized teachers do not inculcate religion." *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971). *See also Leavitt v. Committee for Public Educ. and Religious Liberty*, 413 U.S. 472, 480 (1973) ("[t]he state is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination.")

Congress has also recognized that teacher involvement in religious discussions while on paid time violates the Establishment Clause. In the 1984 Equal Access Act,

which enables students to participate in religious discussions where a limited open forum has been established,[4] Congress specifically provided that school district employees could only attend religious group discussions in a non-participatory capacity. 20 U.S.C.A. § 4071(c)(3) (West 1990). Subsequently, this Court recognized that this non-participation by school authorities was essential in order to insure that implementation of the Equal Access

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[4] Public school is clearly not a forum for religious expression by teachers. See discussion of *Hazelwood, supra,* at pp. 10-11. While it may become a limited open forum for student thought and expression where religious speech is accommodated, that accommodation clearly does not require that teacher expression of religious sentiment be included. 20 U.S.C.A. § 4071(c) (West 1990). *Board of Educ. of the Westside Community Schools v. Mergens,* 496 U.S. 226, 251-253 (1990). Moreover, this Court has recognized that the state may reasonably regulate speech to insure that it comes within the intended purpose of a non-public forum provided that it does not suppress expression merely because of opposition to a speaker's particular viewpoint. See *Perry Educ. Ass'n v. Perry Local Educators Ass'n,* 460 U.S. 37, 45-46 (1983); *Cornelius v. NAACP Legal Defense and Educ. Fund,* 473 U.S. 788, 806 (1985); *Hazelwood,* 484 U.S. at 272. For public employees acting within the workplace, that regulation may include speech which is detrimental to the purpose for which they are employed. *See Pickering; Rankin v. McPherson,* 483 U.S. 378 (1987); *Connick v. Myers,* 461 U.S. 138 (1983).

Each of these cases recognizes the validity of content-based restrictions on public employee speech. See particularly discussion in *Connick v. Myers,* 461 U.S. at 147-148. Furthermore, assertions that the Peloza case involves viewpoint restriction are not well-taken. Nowhere in the Complaint is there an allegation that the District has allowed some teachers to engage in religious discussion with students. That Peloza alone may have been given a specific directive in this regard is nothing more than a function of the fact that he alone aggressively proselytized students, prompting parental complaints requiring District intervention.

Act. *Board of Educ. of the Westside Community Schools v. Mergens*, 496 U.S. 226, 251-253, 260 (1990) (Kennedy, J. concurring).

Upon receiving complaints from parents and students that Peloza, in his capacity as a teacher, was actively engaged in sharing his beliefs relating to the Bible, Jesus Christ, hell, salvation, and the conversion process, the District acted to insure that if these discussions were occurring, they would not continue. The District instructed Peloza not to use his position as a teacher to advance his religious beliefs. (Appendix B at 13b-14b.) The District instructed him to refer student questions relating to religion to parents or clergy. (Appendix B at 14b.)

Peloza asserted a right to engage in those discussions during lunch and other times when students were not actually in class. (See Appendix to Petition at 61a-62a, para. 32). The District clarified the matter to insure Peloza understood that instructional time included time when students were present at school as a result of compulsory attendance laws and when he was on paid duty (Appendix to Petition at 68a, para. 43). In doing so, the District followed this Court's mandate to insure that a subsidized teacher is not inculcating religion, thereby protecting the constitutional rights of students and parents (which is a legitimate pedagogical concern). *Hazelwood School Dist. v. Kuhlmeir*, 484 U.S. 260, 272 (1988). Indeed, the Ninth Circuit recognizes the District had a compelling interest to insure it did not violate the Establishment Clause. (Appendix to Petition at 47a.) See also *Lamb's Chapel v. Center Moriches Union Free School Dist.*, ___ U.S. ___, 113 S.Ct. 2141, 2148 (1993).

II

THERE IS NO CONFLICT BETWEEN THE CIRCUITS IN CASES INVOLVING TEACHER DISCIPLINE OR RESTRICTIONS RELATING TO SPEECH AND ACADEMIC FREEDOM.

Peloza entices this Court to grant a Petition for Writ of Certiorari by asserting a non-existent conflict between the circuits. Peloza asserts that this Court's decisions in *Pickering* and *Tinker* are in conflict. *Pickering* and *Tinker* are however, entirely consistent. Just as there is no conflict between those two decisions, there is no conflict between the circuits. Moreover, as recognized by this Court, questions relating to teacher speech are often decided on the basis of their individual circumstances. *Pickering*, 391 U.S. at 569. Finally, the cases Peloza relies upon do not concern the Establishment Clause.[5]

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[5] In discussing many of the cases which Peloza cites as creating two separate and distinct tests, one commentator cited by Peloza in his brief has noted that the tests "closely approximate" each other, and further notes that "both tests" offer teachers substantial first amendment protection of their speech. Clarick, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 63 N.Y.U. L.Rev. 693, 708 (June 1990). That same commentator also concludes that cases involving the permissibility of teaching religious values in schools decided on establishment grounds are of little value in reaching a determination on regulating teacher expression that does not involve religious values. *Id.*, at pp. 696-697. Only one of the circuit cases Peloza cites deals with the religion issue, which was fundamental to the determination of both courts below. Moreover, an actual reading of the cases cited at page 13 of the Petition does not support the conclusion reached. Some of the cases do not even discuss *Pickering* or *Tinker*. See, e.g., *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969); *East Hartford Educ. Assoc. v. Board of*

In *Pickering v. Board of Educ.*, 391 U.S. at 568, this Court concluded that a school district acting as an employer has an interest in regulating the speech of its employees to insure that its public mission is accomplished. The Court recognized that teachers do not "relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work." *Id.* The Court concluded that, if the teacher's speech would harm the school's ability to operate efficiently or inhibit the teacher's ability to carry out his/her duties, the speech could be regulated. See 391 U.S. at 572-73. There is nothing inconsistent between this holding and this Court's decision in *Tinker.*

In *Tinker,* the Court recognized that students, as well as teachers, did not shed their constitutional rights at the

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Educ., etc., 562 F.2d 838 (2d Cir. 1977). Others do not involve teacher rights to speech but the rights of students to particular instructional materials. *Zykan v. Warsaw*, 631 F.2d 1300 (7th Cir. 1980); *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577 (6th Cir. 1976). The most recent decisions cited are based on this Court's analysis in *Hazelwood* and conclude that the issue is one of limitations which are reasonably related to pedagogical concerns. See *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993); *Miles v. Denver Public Schools*, 944 F.2d 773 (10th Cir. 1991); *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991). Indeed, it is difficult to see any difference between the standard applied in these last three cases and that applied by the Ninth Circuit in *Nicholson v. Board of Educ.*, 682 F.2d 858 (9th Cir. 1982), which allowed a school district to insure that teacher expression did not impede the teacher's proper performance of duties in the classroom or interfere with the regular operations of schools. *Nicholson* was cited with approval by this Court in *Hazelwood*, 484 U.S. at 273, n. 7.

schoolhouse door. 393 U.S. at 506. As in *Pickering*, the Court in *Tinker* recognized the obligation of school officials to prescribe and control conduct in the schools. 393 U.S. at 507. In dealing with student speech, the Court concluded that the case did not concern speech that intruded on the rights of other students. 393 U.S. at 508. The Court also concluded that the public school had a legitimate interest in regulating speech which would substantially interfere with the work of the school *or* impinge upon the rights of others. 393 U.S. at 509, 513. The *Tinker* court also recognized that the students' right to freedom of speech would yield to a constitutionally valid reason for regulation. 393 U.S. at 511.

In this case, both the Ninth Circuit and District Court recognized *Tinker* and concluded that the directives issued by the Defendants were an appropriate regulation of employee speech in light of the constitutional mandates of the Establishment Clause, combined with the rights of students and parents to be free from proselytization by a paid teacher in a public school setting. (Appendix to Petition at 13a and 47a.) These decisions by the courts below are consistent with both *Tinker* and *Pickering*.

The Ninth Circuit's decision in this case is substantially similar to decisions in the Tenth and Eleventh Circuits dealing with teachers involved in religious speech while performing official duties. Rather than being inconsistent with these circuits as asserted at page 13 of the Petition, the Ninth Circuit in this case reached a similar result in recognizing a school district's right to restrict religious speech directed at students by public school teachers while on duty. *Bishop v. Aronov*, 926 F.2d 1066

(11th Cir. 1991); *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990).

III

DISMISSAL OF THIS ACTION WAS APPROPRIATE IN LIGHT OF DOCUMENTS JUDICIALLY NOTICED AND INCORPORATED IN THE COMPLAINT BY REFERENCE.

While it is true that in considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court assumes the existence of well-pled facts, it is equally true that mere conclusions of the pleader are not accepted as true. *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993); *Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962, 971 (1st Cir. 1993); *Perkins v. Silverstein*, 939 F.2d 463, 466 (7th Cir. 1991). Moreover, the court is not required to accept as true assertions which are contrary to matters of which the court may take judicial notice. *Watterson v. Page*, 987 F.2d 1, 3-4 (1st Cir. 1993); *Kramer v. Time-Warner, Inc.*, 937 F.2d 767, 773 (2d Cir. 1991); *Mack v. South Bay Beer Distrib., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). The Court may look to material found in documents incorporated by reference in the complaint or which form the basis of the complaint. *Pension Benefit Guaranty Corp. v. White Consolidated Indus., Inc.*, 998 F.2d 1192, 1196 (3rd Cir. 1993); *Venture Associates Corp. v. Zenith Data Systems Corp.*, 987 F.2d 429, 431 (7th Cir. 1993); *Fudge v. Penthouse Int'l. Ltd.*, 840 F.2d 1012, 1014-1015 (1st Cir. 1988). *See also Webster v. New Lenox School Dist. No. 122*, 917 F.2d 1004, 1006 (7th Cir. 1990).

In this case, the District Court had not only the Complaint and the documents incorporated therein by reference, but also the State Curriculum Framework for the Teaching of Science which set forth the requirements for biology instruction relating to evolution. As a result, there was no factual question as to what the District required Peloza to teach, or whether the instruction he was required to give involved atheism or inhibition of religion, as asserted in the Petition at page 20, note 9. As set forth in the written directives, Peloza had been directed to teach the subject of evolution in compliance with the California Department of Education Science Framework. Many of the concepts relating to the theory of evolution contained in that Framework are also set forth in the incorporated directives. (Appendix B at 15b-20b.)

This information provided the factual basis for the trial court's description of the theory of evolution, which the appellate court accepted. (Appendix to Petition at 12a and 45a-46.) What Peloza and all public school teachers in California were required to teach is nothing more nor less than what this Court has on several occasions recognized as a valid scientific theory which may be taught in public schools without violating the Establishment Clause. See *Epperson v. Arkansas*, 393 U.S. 97 (1968), and *Edwards v. Aguillar*, 482 U.S. 578 (1987). Moreover, the requirement that Peloza not teach creationism as a counterbalance to evolution is also appropriate constitutionally as recognized by this Court in *Edwards*.

In light of the fact that what Peloza was required to teach was not in violation of the Establishment Clause, there is no constitutional basis for asserting that he can

substitute his own materials for the established curriculum. See *Epperson v. Arkansas*, 393 U.S. at 107. Finally, the requirement that Peloza not engage in religious discussion with students while on paid time is also a subject which can be decided as a matter of law. Consequently, the Ninth Circuit did not err in granting a judgment affirming the District Court's dismissal of Peloza's Section 1983 and Section 1985 claims.

CONCLUSION

The issues raised by the facts and circumstances of this case have been clearly resolved by prior decisions of this Court. There simply is no basis in law for asserting that a paid public school teacher can use his position and paid time to proselytize students, whether in or out of class. Nothing in this Court's prior decisions, nor in any case pending before this Court, suggests that there is now or ever will be a legal basis for such an assertion. The Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

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APPENDIX A

CALIFORNIA EDUCATION CODE

§ 44807. Duty concerning conduct of pupils

Every teacher in the public schools shall hold pupils to a strict account for their conduct on the way to and from school, on the playgrounds, or during recess. A teacher, vice principal, principal, or any other certificated employee of a school district, shall not be subject to criminal prosecution or criminal penalties for the exercise during the performance of his duties, of the same degree of physical control over a pupil that a parent would be legally privileged to exercise but which in no event shall exceed the amount of physical control reasonably necessary to maintain order, protect property, or protect the health and safety of pupils, or to maintain proper and appropriate conditions conducive to learning. The provisions of this section are in addition to and do not supersede the provisions of Section 49000.

CALIFORNIA CODE OF REGULATIONS, TITLE 5

§ 5552. Playground Supervision.

Where playground supervision is not otherwise provided, the principal of each school shall provide for the supervision by certificated employees of the conduct and safety, and for the direction of the play, of the pupils of the school who are on the school grounds during recess and other intermissions and before and after school.

CALIFORNIA CODE OF REGULATIONS, TITLE 5

§ 5570. When School Shall Be Open and Teachers Present.

Unless otherwise provided by rule of the governing board of the school district, teachers are required to be present at their respective rooms, and to open them for admission of the pupils, not less than 30 minutes before the time prescribed for commencing school.

All teachers shall observe punctually the hours fixed by regulation of the governing board of the school district for opening and closing school.

APPENDIX B

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Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

JOHN E. PELOZA, Plaintiff, v. CAPISTRANO UNIFIED SCHOOL DISTRICT, BOARD OF TRUSTEES OF THE CAPISTRANO UNIFIED SCHOOL DISTRICT, PAUL B. HASEMAN, CRYSTAL KOCHENDORFER, MARLENE M. DRAPER, ANNETTE B. GUDE, KATHRYN I. ITZEL, E.G. KOPP, A. EDWARD WESTBERG, JEROME R. THORNSLEY, WILLIAM D. ELLER, GERALDINE JAFFE, THOMAS R. ANTHONY, ROSS VELDERRAINE, JAMES CORBETT, PAUL PFLUEGER, RAY PANICI, TIM DUNN, WILLIAM REDDING AND DOES 1 THROUGH 200, INCLUSIVE,	CASE NO. CV 91-5268 DWW(Bx) DECLARATION OF THOMAS ANTHONY [F.R.C.P. 12(b)6, Fed. R. Ev. 201] DATE: December 16, 1991 TIME: 9:00 a.m. COURTROOM: Honorable David W. Williams

DECLARATION OF THOMAS ANTHONY

I, THOMAS ANTHONY declare as follows:

1. I am currently the Director of Secondary Schools for the Capistrano Unified School District and a defendant in the above-entitled action. From July, 1986 to July, 1991 I was the principal of Capistrano Valley High School, the school where Plaintiff John Peloza has been teaching biology class during all times relevant to this litigation.

2. While I was principal of Capistrano Valley High School, it was my responsibility to ensure that all state and district curriculum guidelines, frameworks and policies were adhered to in all classes taught at Capistrano Valley High School. Whenever a curriculum was not being followed by an individual teacher, it was my responsibility to investigate the matter and, when necessary, take appropriate steps to make sure that the assigned curriculum would be followed.

3. With respect to Plaintiff, it came to my attention that there were complaints being lodged with my office indicating that he was not following the assigned curriculum regarding the teaching of evolution in his biology class. I investigated the matter and, as a result of that investigation, on February 7, 1991 I personally issued Plaintiff a Written Reprimand. This Reprimand is the same February 7, 1991 Reprimand that Plaintiff alleges I issued to him in Paragraph 26 of his Complaint.

4. In Paragraph 26 of his Complaint, Plaintiff incorporates the February 7, 1991 Reprimand into his Complaint as part of his allegations. A true and correct copy

of that Reprimand given from me to Plaintiff is attached hereto as Exhibit A to my Declaration.

5. Paragraph 26 also incorporates by reference into the Complaint an October 11, 1990 letter from then Vice Principal Ross Velderraine to Plaintiff. I assisted in the drafting of that letter and personally reviewed it prior to it being delivered to Plaintiff. Additionally, I have reviewed Plaintiff's personnel file in order to make sure that the October 11, 1990 letter incorporated by reference in Plaintiff's Complaint is the only October 11, 1990 letter from Ross Velderraine. After reviewing the letter and Plaintiff's personnel file, I can state that a true and correct copy of the October 11, 1990 letter from Ross Velderraine to Plaintiff and incorporated by reference in Paragraph 26 of Plaintiff's Complaint is attached to my Declaration as Exhibit B.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed this Illegible day of November, 1991, at Illegible, California.

/s/ Thomas Anthony
Thomas Anthony

7/237/061458-0016/004

Exhibit A

CAPISTRANO UNIFIED SCHOOL DISTRICT

CAPISTRANO VALLEY HIGH SCHOOL
Mission Viejo, California

February 7, 1991

TO: John Peloza, Teacher, Capistrano Valley High School

FROM: Tom Anthony, Principal, Capistrano Valley High School

SUBJECT: REPRIMAND

This letter constitutes a formal written reprimand for your repeated refusal to follow course outlines and curriculum guides regarding the teaching of evolution as a valid scientific theory to your high school Biology classes. This letter also constitutes a formal written reprimand for your inappropriate discussion of religion with students in an attempt to convert them to Christianity.

On June 9, 1990, a meeting was held between Bill Redding, Curriculum Specialist for Science, you and Mr. Velderrain, Vice Principal. During that meeting you were advised that you must always follow course outlines and curriculum guides provided by the District and that you must not teach creationism in the classroom as it does not comply with the State Framework on Science. You were advised that you are not to teach religion in the classroom in the context of the subject matter of evolution.

In a letter dated October 11, 1990, from Ross Velderrain, you were given clear directions as to what the Capistrano

Unified School District expects you to teach in the subject of evolution in compliance with the California State Department of Education Science Framework, and to inform you not to teach creationism in the classroom. A copy of Mr. Velderrain's October 11, 1990, letter is attached to this reprimand. These issues have been raised with you during the past two years pursuant to complaints from parents, students and other staff members. Mr. Velderrain's letter of October 11, 1990, clearly informed you that your presentation of the theory of evolution violated both the letter and the spirit of the state curriculum guidelines whose intent is to have evolution taught as one of the main themes of science and that creationism not be taught in the classroom. Further, he told you he would be available to assist you in meeting the objective of developing lesson plans that presented evolution as a valid scientific theory.

As a follow-up to the October 11, 1990, letter, several meetings were held between you, Dr. Harold Hester, Director of Secondary Education for the District, Bill Redding, and Mr. Velderrain regarding your lesson plans on the unit of evolution for the 1990-91 school year. After several meetings, it was agreed that Dr. Hester and Mr. Velderrain would separately observe you as well as other biology teachers at the high school teaching evolution to their classes. During these classroom observations by Dr. Hester and Mr. Velderrain you began your unit on evolution by passing out an outline entitled "Evidence in Support of the Refutation to Evolution": similar to the outline you had passed out in the 1989-90 school year.

Although when you were formally observed by administrators you did not make any religious comments or

directly attach [sic] evolution as an invalid scientific theory, several students who are in different periods of your high school Biology classes stated that since the beginning of the 1990-91 school year you have made many comments regarding your views on creationism. Following is a summary and some specific instances where inappropriate curriculum was taught or inappropriate comments to students were made.

Several students heard you state at the beginning of the 1990-91 school year that you had a movie on prehistoric man that you wanted to show to the students but that the school board would not let you do it because they would disapprove. You stated that you were a creationist and that you were free to say it. At the beginning of the 1990-91 school year, you stated to your second period Biology class, "I know it's not legal to teach religion in class, but I don't care if I get fired for my beliefs." You stated that you have been with the District ten years and have not been fired yet.

During the first semester of the 1990-91 school year, you stated that the Bible was the historical way and that it cannot be proven wrong. On more than one occasion since the beginning of the 1990-91 school year, you have stated to your students that the school board won't let you teach what you want to on creation. In September of 1990 you stated that you were "a creationist" and that "we will go into evolution but I am a creationist."

Several of your students remarked that your method of teaching them the unit on evolution was to instruct them to outline the chapters in the science textbook on their own, and that the next day in class you would show the

students how the information they had outlined the previous day on evolution was wrong. Often when you were asked a question by a student on an issue such as prehistoric fossils, your reply was that what the text said was all wrong, there was no proof, and you would state what creationism said about the issue. When you taught units other than evolution you followed the textbook. According to several of your students you spent approximately a week and a half teaching the class about how evolution was wrong, disproving it and almost never used the textbook. You "taught" them the theory of evolution by telling the students to read the chapters in the book, but never teaching it yourself.

Sometime in October, 1990, during your second period Biology class in response to a remark by you that anyone who did not believe in Jesus Christ would go to hell, [deleted]* told you that she did not believe in Jesus Christ and that she knew she was not going to hell. You told her to come in at lunchtime and talk to you about this in your office. [deleted] came into your classroom during lunchtime with another student, [deleted].

During your lunchtime conversation with [deleted], you began by taking out a Bible from your brief case. [deleted] asked you how you could state that God exists and you quoted various portions of the Bible to prove that God did exist. [deleted] remarked that the Bible can be interpreted in many different ways depending on who is reading it. You replied that "My way is the right way

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*The names of the students have been deleted to protect their identity.

because I believe in Jesus Christ" and then stated, "if you do not believe in Jesus, you will go to hell."

[deleted] replied that Jews do not believe in hell and Jews do not believe that Jesus is the Messiah. You replied "What I believe is in Jesus and you should believe it too." [deleted] asked if you were here to convert her and you stated no, you were here to get people to be aware of religion and that everybody should believe in being a Christian just like you did. You stated, "If you believe in Jesus and you sign and you ask Jesus to forgive you, he will because he forgives and forgets." You further stated that there is so much sin on Earth because the devil has come out and taken over the world and that at this time Jesus is holding the world together in his hands.

On December 18, 1990, [deleted] and [deleted], parents of [deleted], lodged a formal written complaint protesting your preaching religion to your students, stating that you said those students who did not accept Jesus Christ would definitely "go to hell." The [deleted] further protested what they stated to be your absolute rejection of the theory of evolution, your characterization of it as undocumented fact and objected to your teaching to your science classes that the theories of the Bible regarding creationism were the only truth about evolution.

On December 9, 1990, [deleted] the father of [deleted] also lodged a formal written complaint against you. The substance of Mr. [deleted] complaint was that during your sixth period Biology class you proceeded to discuss the merits of fundamentalist Christianity, stating that if one did not believe in divine creation and the divinity of Jesus Christ one was doomed to go to hell for all of

eternity. According to Mr. [deleted], you described what would happen to someone who did not believe in Jesus Christ in graphic detail.

Mr. [deleted] centers around an incident that took place on November 27, 1990, during seventh period between you, his daughter [deleted] and another student [deleted]. On November 27, 1990, these two students stayed after class because they were trying to prove that you were wrong about evolution, the Lucy skeleton and transitional forms. During this discussion you stated that none of these things were true and that "there has to be a creator." According to [deleted] you then "preached that Jesus is the only way." You explained hell to [deleted] as follows; "You are constantly burning, your teeth are getting knocked out, you are always suffering, there are demons around you for all eternity, and you can never leave." You also stated that, "if you do not believe in Jesus Christ you will burn in hell forever." You told these girls that there are lots of ways to get to hell but there is only one way to get to heaven and that is to believe in Jesus Christ as God. [deleted] told you that she believed in God and you remarked that "Jesus is God so you don't believe in God if you do not believe in Jesus."

[deleted] asked you what happened if you were a good person and you responded, "It doesn't matter if you don't believe in Jesus." You further stated that "God was not fair but if God were fair everyone would be in hell because all of humanity are such sinners." [deleted] then told you she was really worried about her family going to hell especially her seven-year-old brother. You told her that it was a shame her parents were so stubborn in not letting her believe the right way, i.e., that Jesus was God.

[deleted] told you she was thinking about converting because she did not want to go to hell.

You then told [deleted] she was already a Christian because once you have converted you become a Christian and you cannot take it back. You told her that God, meaning Jesus, would never kick [deleted] out of heaven. After that, you remarked, "Let's pray together." The three of you closed your eyes and put your heads down. You instructed [deleted] to accept Jesus into her heart and to repeat the following words: "I [deleted], will want Jesus to love me, accept me and take me into his heart." You then stated, "This is final, that's it 'you're a Christian' you cannot take it back." You asked [deleted] if she would like a Bible and then joked "I'll get you a pocket Bible so your parents won't know."

[deleted] was very distraught after this conversion and on November 28, 1990, told her mother about the conversion and how badly she felt because no one else in her family would be going to heaven with her. [deleted] called her Rabbi and went to his house with her father.

On December 11, 1990, at your instigation, you switched sixth period Biology classes with Mr. Ray Panici for that one day only. According to several of your students the purpose of your switching classes with Mr. Panici was because you stated that you were biased towards creationism and you wanted to be fair; therefore, you thought that the two classes should switch teachers so they could hear Mr. Panici's view since he was an evolutionist.

On December 12, 1990, your sixth period Biology class was having a discussion on what Mr. Panici had taught

them. You got into a discussion on satanism and several members of the class remarked that you could not prove the satanism was wrong. Several students kept insisting that it was not fair for you to state that evolution and satanism were wrong because you could not disprove these things. At that point you started to discuss the Bible.

You quoted from the Book of Genesis, discussing Adam and Eve, discussing other portions of the Bible and in essence "preaching" to your class. You also discussed Lucifer stating that there were three angels besides God and Lucifer was kicked out of heaven and sent down to hell. You stated that the devil made Eve take the apple from the tree and that is how the devil got dominion over the Earth. You then stated that now the devil rules over the Earth and that is why the world is evil and why we have sin. Although you began this discussion with the Book of Genesis you kept quoting numerous Biblical passages from memory. You talked a long time about Jesus Christ, preached about Jesus, and stated there was no other way to believe and that you "know the one way is right." You also discussed extensively good versus evil and Jesus or Christians versus everyone else. This discussion took place for approximately 15 to 20 minutes during your sixth period Biology class on December 12, 1990.

During the first semester of the 1990-91 school year, in your second period Biology class, you got entirely off the subject matter and made the following statements to the entire class. You told the class that you saw Jesus Christ save your brother and that you had also seen Jesus save you sister. Whenever you discussed the subject of evolution you said you didn't believe in it and that the Bible

was the one true written document. Sometime in October 1990 you were discussing evolution in your second period Biology class when the class got on the subject of religion and you stated, "if you do not believe in Jesus Christ, you will go to hell."

Faculty members have also taken exception to contradictory statements and apparent misinformation conveyed by you regarding the subject matter of evolution. Another high school Science teacher was teaching atomic theory to his classes and quoted a statement from Dr. David Goodstein of Cal Tech as follows:

> "There are theories in science which are so well verified by experience that they become promoted to the status of fact. One example is the special theory of relativity, it's still called theory for historical reasons, but it is in reality a simple engineering fact routinely used in the design of giant machines like nuclear particle accelerators which always work perfectly. Another example of that sort of thing is the theory of evolution. These are called theories but they are in reality among the best of established facts in all of human knowledge. Our job today is to look into those facts and theories and models which underlie our understanding of the ultimate constituents of matter."

Immediately after the teacher read this statement by Dr. Goodstein, several students took exception to these remarks stating that they were not true and that this individual should talk to Mr. Peloza who would set him straight on evolution.

A Social Science teacher was discussing social Darwinism in her World History class when several of her students

reacted very negatively to the term Darwinism stating that it had no scientific basis, was not provable, and was against the Bible. They cited you as the source of their information. According to one student you had told them that "Darwinism is the same as Communism." This teacher was distressed by the idea that students were being taught theology along with Biology so that the result was that some students were not even open to discuss how the concept of Darwinism impacted history.

The District has the responsibility to monitor the content of its teachers' lesson plans to ensure that the establishment clause of the First Amendment is not violated. A teacher's freedom to exercise and express their religious preference is limited by their students' rights to be free from religious indoctrination or influence in the classroom. The District's Board Policy on the Instruction of Controversial Issues, number 6136, Section IV (B) 13, explicitly states that teachers have the responsibility to "refrain from attempting to indoctrinate students with his/her point of view." When a teacher in a public school uses religion and teaches religious beliefs in a science class, or espouses theories which are clearly based on religious underpinnings, the principles of the separation of church and state are clearly violated.

You are hereby directed to refrain from any discussion of religion in any of your science classes and to refrain from attempting to influence your students to accept your own personal religious or philosophical beliefs. You are directed to follow the course outlines in the subject area of high school Biology and more specifically in the teaching of evolution.

You are further directed to refrain from making any comments about Jesus Christ, about the fact that people who do not believe in Jesus Christ burn in hell, and to refrain from discussing religion or quoting from the Bible during any of your classes. If a student does ask you a question about religion, you are directed to refer them to their parents or to their own clergy person for guidance.

You are further directed to teach evolution as a valid scientific theory and to refrain from any teaching of creationism as a valid scientific theory. This direction to teach evolution as a valid scientific theory is a part of the accepted and adopted school curriculum in high school Biology and your refusal to teach evolution can be construed to constitute persistent failure to obey local and state rules and regulations regarding classroom instruction, evident unfitness for service and unprofessional conduct. You are explicitly directed to refrain from teaching creationism in addition to, rather than, or in refutation to, evolution. Please be advised that should you fail to comply with these written directives or should there by [sic] any additional incidents of this kind, further disciplinary action will be considered.

A copy of this written reprimand will be placed in your personnel file ten (10) days from today. If you wish to respond in writing to this reprimand, please do so within ten (10) calendar days by sending your response to Dr. Harold Hester, Director, Secondary Education. Any response will be attached to this reprimand and included in your personnel file.

cc: Personnel File

Exhibit B

CAPISTRANO VALLEY
HIGH SCHOOL **(LOGO)**
26301 VIA ESCOLAR MISSION VIEJO, CA 92692
(714) 364-6100

October 11, 1990

To: John Peloza, Biology Teacher

From: Ross Velderrain, Vice Principal

Subject: TEACHING EVOLUTION IN HIGH SCHOOL BIOLOGY CLASSES

I am writing you at the beginning of the school year regarding this subject for several reasons:

1. To provide you with clear direction regarding what the district expects you to teach in the subject of evolution in compliance with the California Department of Education's science framework,
2. To inform you of the State Board of Education's January 13, 1989, policy statement on the teaching of natural sciences, and
3. To reinforce the district's concerns regarding your following course outlines and curriculum guides and not teaching creationism in the classroom.

On June 9, 1989, a meeting was held between Bill Redding, Curriculum Specialist for Science at the Capistrano Valley High School, Thomas Anthony, Principal of the high school, and you and I. During this meeting you were advised that you must always follow course outlines and curriculum guides provided by the district, and that you must not teach creationism in the classroom as it does not

comply with the State framework on science. You were advised that you are not to teach religion in the classroom in the context of the subject matter of evolution.

Please be assured that the district is well aware that you have very strong religious beliefs regarding the biblical theory of creationism and that you personally feel it to be a valid scientific theory. While the federal and state constitutions protect an individual's freedom of religious beliefs, when you teach biology, you are expected to follow the State framework and implement appropriate curriculum in the area of evolution.

On January 13, 1989, the State Board of Education adopted a policy statement on the teaching of natural sciences; this statement supersedes the Board's 1972 Anti-dogmatism Policy which was printed as part of the 1984 science framework addendum. The statement specifically addresses the issue of evolution and creationism and reads in pertinent part as follows:

- "Discussions of any scientific fact, hypothesis, or theory related to the origins of the universe, the earth, and of life (the how) are appropriate to the science curriculum.

- Discussions of Divine creation, ultimate purposes, or ultimate causes (the why) are appropriate to the history-social science and English-language arts curricula.

- Philosophical and religious beliefs are based, at least in part, on faith and are not subject to scientific tests and refutation. Such beliefs should be discussed in the social science

and language arts curricula. The Board's position has been stated in the Board's adopted policy, Moral and Civic Education and Teaching about Religion (1988), and in the History-Social Science framework (1988).

- Neither the California nor the United States Constitution requires, in order to accommodate the religious views of those who object to certain material or activities that are presented in science classes, that time be given in the curriculum to those particular religious views. It may be unconstitutional to grant time for that reason."

The 1990 "Science Framework for California Public Schools, Kindergarten Through Grade 12" adopted by the California State Board of Education, was developed by the Science Curriculum Framework and Criteria Committee. All references are to the 1990 addition of this framework published by the California Department of Education. The science framework discusses the nature of science in Chapter 1 and the subject of evolution as follows:

- "Evolution is the central organizing theory of biology and has fundamental importance in other sciences as well. It is an accepted scientific explanation and therefore no more controversial in scientific circles than the theories of gravitation and electron flow."

- The theory of evolution, like other theories, is more than the sum of the facts from which it is derived. It is the best explanation for the facts, and it has predictive value. However evolution has worked – its patterns, processes, mechanisms, and history – composes the theory

of evolution, which is constantly being modified as new evidence emerges.

- Teachers should be aware that the theory of evolution has been tested and refined for over a 100 years and that the majority of criticisms that find their way into popularly circulated publications have not been validated scientifically; usually, the criticisms have been evaluated and rejected by the scientific community. Teachers should consider the validity of such criticisms carefully before accepting them or deciding whether they are worth "creation science" (or "scientific creationism") has been thoroughly studied by the leading scientific societies and rejected as not qualifying as a scientific explanation.

- Some students may be concerned about evolution and its bearing on their religious beliefs. Teachers – and textbooks – should make it very clear that from a scientific prospective, evolution, like other scientific topics, does not bear on an individual's religious beliefs. Science is not theistic, nor it is atheistic; it does not presuppose with the mechanics, processes, patterns, and history of nature; it is neutral with respect to divinity, the supernatural, or ultimate causes. . . . The way in which scientific understanding is related to religion is a matter for each individual to resolve; thus, the State Board's policy is that there should be a clear separation between science and religion."

In the 1990 science framework, the State Board of Education sets forth six major themes that comprise the big ideas, overarching concepts, unifying constructs or underlying assumptions of the science framework, and

which are distinct from facts or concepts. These major themes of science are: 1. Energy, 2. Evolution, 3. Patterns of Change, 4. Scale and Structure, 5. Stability, and 6. Systems and Interactions. In discussing evolution in the context of the major themes of science, the State's curriculum reads as follows:

> • "Evolution in a general sense can be described as change through time, and virtually all natural entities and systems change through time. Evolution embodies history and therefore is a part of every discipline in which history has a role. In order to teach life science, earth science, or astronomy, evolution should be a fundamental, central concept of the curriculum. Evolution, which Darwin described as 'descent with modification' is the central organizing principle in life science."

The concurrent teaching of both evolution and creation science violates a science teacher's professional responsibility to teach science since both the scientific community and the courts have found that "creationism" is not science, rather it meets the definition of a "religion" or "religious belief." Because teachers, among other things, provide role models for their students, it is imperative that a science teacher be a role model for the scientific community and the scientific processes of careful observation, formulation of a hypothesis, and the experimentation and collection of data leading to a conclusion which either supports or rejects the hypothesis. The scientific community as a whole, and its professional organizations such as the American Association for the Advancement of Science (AAAS), the National Academy of Sciences (NAS), the National Science Teachers Association (NSTA)

and the American Biology Teachers Association (ABTA), have all found that evolution and its theories have withstood the test of time and that creationism fails to meet scientific criteria as a valid scientific theory.

During the past two school years, concerns have been raised and brought to my attention that you were either openly teaching creationism in your science classes or attacking evolution as an invalid scientific theory based on your belief in creationism. These concerns were brought to my attention by students, parents and other staff members. A review of your 1989-90 lesson plans in the area of evolution buttresses these concerns since your lesson plans are entitled "Evidence in Support and Refutation to Evolution" and you have a separate subsection entitled "Evidence in Refutation to Evolution." My review of your last year's lesson plans in the area of evolution indicates that the clear thrust of these lesson plans is to promote creationism and classify the theory of evolution as a speculative hypothesis and to refute the accepted theory of evolution point by point. Your presentation of the theory of evolution clearly violates both the letter and the spirit of the State curriculum guidelines whose intent is to have evolution taught as one of the main themes of science and that creationism not be taught in the classroom.

Before your Stull Bill goals and objectives are finalized for this year, I am requesting that you provide me with lesson plans that demonstrate how you will meet the objective of teaching evolution in the classroom in compliance with the State science framework and curriculum. Bill Redding, who has had many discussions with you regarding the teaching of evolution and, conversely, that

creationism should not be taught in science classes, is available to work with you to assist you in developing lesson plans that present evolution as a valid scientific theory. I am requesting that you have these lesson plans submitted to me by October 16, 1990. I am also available to assist you in meeting this objective.

/s/ Ross Velderrain
Ross Velderrain
Vice Principal

/pa

cc: Harold Hester
Thomas Anthony